

Appeal from a decision of the Redding Resource Area Manager, Ukiah, California, District Office, Bureau of Land Management, dismissing a pro-test to the termination of casual use of a road across Federal lands, and requiring application for a right-of-way for continued use of the road.

Affirmed.

1. Mining Claims: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications

Nothing in the general mining laws invests individuals who reside on patented mineral land with a right of access across Federal Land, when it appears from the record that the land is not subject to mineral exploration and development.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications

When individuals who gain access to private property by means of a timber road across Federal lands fail to maintain the road so as to prevent damage to the road and the surrounding environment, BLM properly terminates their use of the road under the "casual use" regulations, 43 CFR 2800.0-5(m). Where private landowners' use of a BLM road does not qualify as casual use under the regulations, they must obtain a right-of-way grant pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1761 (1982), in order to continue to use the road.

APPEARANCES: Bob Strickler, Ed Toich, and Robert Volks, pro sese.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Bob Strickler, Ed Toich, and Robert Volks filed a joint appeal from the May 2, 1986, decision of the Redding Resource Area Manager, Ukiah, California, District Office, Bureau of Land Management (BLM), dismissing

their protest 1/ of a BLM decision, dated March 28, 1986, to terminate their "rights of ingress and egress under casual use on the West Weaverville Road."

In its March 28, 1986, decision, BLM provided the following history of the West Weaverville Road, its use by appellants, and BLM's reasons for terminating their use of the road:

As previously explained, a major portion of this road was constructed in 1971 by the Bureau as a dry weather logging road. This road was not designed nor ever intended to be utilized as a year-around access route. As time past [sic], sub-division occurred, residences were constructed, and increased traffic appeared. However, as the number of year-around users increased, so did the amount of damage to the road.

This continued until January, 1984, when the Bureau gated the road for the first time to restrict access to all users except those living in the Democrat Gulch drainage. This action was necessary as casual use had now begun to cause environmental damage to the road system. Shortly after this, a meeting was held with all of the landowners, in February, to discuss usage and road maintenance options. These alternatives included: formation of a road maintenance association with one right-of-way for all users; individual rights-of-ways with maintenance requirements; do nothing but what was necessary to maintain the road for its [sic] original purpose; or eliminate vehicular traffic during the winter months.

After this it was expressed to the Bureau that the owners felt they had legal access via the old Lucky Strike mining claim. We were requested to review this document. In May, 1984, it was conveyed back to the group that our Solicitor had determined they did not have legal access once this claim was patented.

In August the Bureau was informed the landowners would not acquire a right-of-way to legalize their access across public lands.

The gate was locked in November, again in an attempt to prevent non-owners from causing damage to the road. However, it was observed several times that the gate was either left open or closed but not locked.

1/ This protest was signed by Bob Strickler, Judy Strite, John Strite, Jay Strite, Rick Manus, Paula Bourgeois, Vicki S. Toich, Ed Toich, Leon Cody, Darlene Cody, and Bob Volks. However, the notice of appeal and statement of reasons was signed by Bob Strickler, Ed Toich, and Robert Volks.

During the spring and summer of 1984, between the efforts of the landowners, ourselves, and our timber contractor, the road was in good condition going into the winter months. However, by the spring of 1984 environmental damage to the road had begun to occur. Continued work by the owners improved the road during the summer and fall but not enough work was completed to prevent unacceptable environmental damage during the spring of 1986.

To date, neither [h]as an association or has any individual applied for a right-of-way. Therefore, to prevent any further damage to the subject road, a decision has been made that upon receipt of this letter, your rights of ingress and egress under casual use on the West Weaverville Road is hereby terminated. However, to prevent this termination, you have 14 days to apply for a right-of-way which will include the necessary requirements to upgrade and maintain this system as an all-weather road.

(BLM's Decision of Mar. 28, 1986).

On April 29, 1986, appellants filed a letter with BLM protesting this decision, stating: "We believe that we have the right to ingress/egress as granted in our patent and other laws."

In its May 2, 1986, decision, BLM dismissed the protest filed by appellants, explaining more clearly its legal rationale for closing the road to "year-around residential access":

Approximately two years ago this group of property owners [was] encouraged to apply for a joint right-of-way in order to legalize everyone's access and at the same time form a road maintenance association. The Bureau did not receive a right-of-way application as the residents felt they had already obtained legal access through their property deeds.

In checking the Bureau records, it was determined the Bureau had never issued a right-of-way to any of the current or previous owners who were or had ever used the West Weaverville Road. It has also been explained to the group that once a patent is issued for a group mining claim, the owner does not have any right of ingress and egress across adjacent public lands.

It was then agreed that the road could be used for private access under casual use if the road was adequately maintained to prevent any further road or environmental damages. In 43 CFR 2800.05(m) casual use means activities that involve practices which do not ordinarily cause any appreciable disturbance or damage to the public lands, resources or improvements and, therefore, do not require a right-of-way grant or temporary use permit.

The road has been jointly maintained by the group; by a Bureau timber contractor; and from Bureau appropriated road

maintenance funds. However, this level of maintenance has not been adequate to prevent both road and environmental damages this past winter.

Therefore, the group's protest against the termination of access rights under casual use on the West Weaverville Road is hereby dismissed.

(BLM's Decision of May 2, 1986).

In their statement of reasons (SOR), appellants advance several arguments as to why BLM's decision is in error. First, they argue that because they reside on land included in a patent under the mining laws, "legal right-of-way was granted to [them] in the original patent on [their] land and by other related laws." Second, they maintain that they "have not violated casual use," since "[c]asual use does not apply where a right-of-way exists." Third, according to appellants, they have maintained their verbal agreement with BLM, repairing damaged areas and upgrading other areas. In this connection, they assert that BLM has abrogated its verbal agreement to "maintain their share of the road maintenance." Fourth, they assert that they "should not be required to repair roads in mid-winter when equipment and materials cannot be properly used." Finally, they disagree with BLM that "only 1/3 of a mile of [their] access road is aligned with the old mining road and that the balance is new BLM construction." They assert that the "'new construction' blocked or cut off the old road leaving us only this 'new route' to travel. The entire second half of the new road closely follows the old route."

[1] In a letter dated July 11, 1984, to Senator Cranston, Mr. and Mrs. E. Toich, who are among the appellants herein, stated that "[f]rom 1935-1974 there were no residents on the patent property. In 1974, one family moved onto their newly acquired property. In 1975 3 families moved onto their property, and since 1977-there are a total of 7 families." This land was originally patented to Everett and Loag Armentrout on December 18, 1925, pursuant to R.S. Ch. 6, Tit. 32 (2d ed.). This patent does not mention a right-of-way.

It is true that a mining claimant enjoys certain rights of access across Federal lands to explore and develop a mining claim. However, there is no suggestion in the record that this land is subject to mining activity. See generally 4 American Law of Mining, Chapter 101 (1987) and authorities cited therein. Contrary to appellants' position, the fact that they derive title to the land which they now occupy from a patent issued under the mining laws in 1925, does not invest them with a "legal right-of-way" to their property across Federal lands. Cf. Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985) (under 30 U.S.C. § 26 (1982), where there is no actual mining or related activities, there is no right to use the surface of the land subject to a mining claim).

[2] If appellants' use of the West Weaverville Road does not qualify as casual use, they must obtain a right-of-way grant from BLM under section

501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1982), in order to continue to use the road. BLM promulgated the regulations at 43 CFR Part 2800 to "establish procedures for the orderly and timely processing of applications, grants, permits, amendments, assignments and terminations for rights-of-way and permits over, upon, under or through public lands pursuant to title V, Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761-1771)." 43 CFR 2800.0-1. Initially, BLM determined that appellants' use of the West Weaverville Road qualified as casual use under 43 CFR 2800.0-5(m). That regulation defines "casual use" as including those "activities that involve practices which do not ordinarily cause any appreciable disturbance or damage to the public lands, resources or improvements and, therefore, do not require a right-of-way or temporary use permit under this title." ^{2/} Subsequently, BLM concluded that increased usage of the road was causing damage to the environment to such an extent that use of the road by the private landowners could no longer qualify as casual use.

BLM applied the criteria set forth at section 2801.48(A) of the BLM Manual in deciding to terminate appellants' casual use of the West Weaverville Road. The BLM Manual provides that "[t]he authorized officer shall make every effort to allow uses of the public lands without a right-of-way or temporary use permit, under the provisions for casual use." BLM includes, among the examples of activities and practices which qualify for casual use, "[i]ngress and egress on existing roads and trails." However, the BLM Manual makes clear that "[c]asual use does not provide the user with any interest or rights in or to the affected public land." Moreover, the BLM Manual provides that "[i]f a proposed use is expected to cause appreciable disturbance or damage to public lands or resources and needs to be controlled, it is not casual use."

That appellants were on notice that they must maintain the road to prevent its damage as a condition of continuing to use the road under the "casual use" regulation is made clear by BLM's letter to the Stricklers dated December 27, 1984. A copy of that letter was mailed to all residents using the road. Therein, BLM stated:

There are still four major soft spots and numerous pot-holes which will require attention to prevent them from causing excessive road damage. These spots were flagged on November 16, 1984, with red candy striped ribbon. Due to the heavy rainfall and wet snow conditions this winter, continuous spot rocking by your group will be required to minimize or keep ruts to a shallow depth.

The rock placed at mile post 1.0 is certainly helping; however, the approach in and out of this spot is now getting soft and

^{2/} A related regulation, 43 CFR 2801.3, provides that "[a]ny occupancy or use of the public lands, other than casual use as set forth in §§ 2800.0-5(m) and 2802.1(d) of this title, without authorization shall be considered a trespass and shall subject the trespasser to prosecution and liability for the trespass." See also Klas, Inc., 101 IBLA 206, 208 (1988) (unauthorized use of Federal land constitutes a trespass).

ruttled. Additional rock placed in the vehicle tracks should be done immediately. Many of the other soft spots will develop into the same situation if not corrected.

As stated previously, this BLM timber haul road was not designed nor is it suitable for continuous wet weather travel. Additional soft spots will occur and immediate action will have to keep them from getting larger and deeper.

Our plans are to monitor this road at least monthly or more often if this wet weather continues. Your continued spot-rocking as previously agreed upon must continue in order for this road to be kept open, since we have not issued any legal rights-of-way on this road. Without your rocking, this road will be closed to all vehicle use during wet weather. [Emphasis in original.]

(BLM Letter, Dec. 27, 1984).

By letter received January 8, 1985, Bob Strickler informed BLM that he took "great offense at the threatening tone" of the above-quoted letter, and stated that "maintenance will continue as soft spots develop." BLM responded, by letter dated January 10, 1985, that the "threatening paragraph was intended to reiterate the fact that your use is unauthorized and BLM will continue to monitor the road use closely until legal rights-of-way are granted."

On February 21, 1986, BLM wrote the Stricklers to advise that it had conducted a road inspection of the West Weaverville Road, and that there were "still four major soft spots and numerous potholes that require immediate attention." (Emphasis in original.) BLM explained that "[e]xcessive road damage is now occurring in these same areas. * * * The rock required must be placed on the road where designated by March 24, 1986. Failure to do this work will result in the road being closed to all traffic" (BLM Letter, Feb. 21, 1986).

On March 28, 1986, BLM wrote the letter protested by appellants. The major portions of that letter are quoted supra, wherein BLM informed appellants that their right of ingress and egress under casual use on the West Weaverville Road was terminated, but that they could "prevent this termination" by applying for a right-of-way which must include the necessary requirements to upgrade and maintain the road as an all-weather road. As noted, appellants' protest against BLM's decision to terminate their casual use of the road was dismissed by letter dated May 2, 1986, and this appeal followed.

The record amply demonstrates BLM's efforts to accommodate appellants' use of the West Weaverville Road. BLM not only encouraged appellants to form a road maintenance association for purposes of maintaining the road so as to prevent its deterioration and related damage to the surrounding environment, but BLM assisted appellants in achieving these objectives by supplying materials and labor. BLM conditioned appellants' continued utilization of the road under the casual use regulation upon their maintaining

the road so as to prevent damage to the road and the surrounding area. The record includes a series of photographs of various portions of the road, taken by BLM officials during the January 1985 inspection. Also, BLM submitted on appeal video recordings of the road filmed in December 1984, February 1985, and March 1986. This evidence reveals the road to be in a condition patently inconsistent with the standard of 43 CFR 2800.0-5(m), *i.e.*, appellants' use of the road had caused "appreciable disturbance or damage to the public lands." While appellants complain that other persons besides the residents in the area use the road, it is clear that the area residents use the road on a regular basis, and that use in the winter months causes some degree of damage to the public lands.

Accordingly, we find that BLM acted well within its authority in deciding to terminate appellants' utilization of the road under the casual use provisions of the regulations, and properly denied appellants' protest. The fact that this timber road may be the only means of access to appellants' property, as they suggest in their SOR, does not affect BLM's authority under section 302(b) of FLPMA, 43 U.S.C. | 1762(b) (1982), and implementing regulations to take the action at issue. BLM has the responsibility to take appropriate steps to prevent degradation of the involved public lands. Consistent with that responsibility, BLM may require appellants to obtain a right-of-way, which includes provisions for maintenance of the road, under section 501 of FLPMA. Since casual use is no longer an option available to appellants under 43 CFR 2800.0-5(m), appellants must obtain a formal right-of-way grant pursuant to section 501 of FLPMA if

they want to continue to use the road. See William F. Bieber, 82 IBLA 6, 7 (1984) (in order to ensure appellant's continued use of a single-lane dirt road, BLM required him to obtain a right-of-way). ^{3/} Use of the road in the absence of a right-of-way will amount to unauthorized use under 43 CFR 2801.3. See note 2 supra.

^{3/} In a lengthy document, attached to their SOR, appellants describe the history of the West Weaverville Road, and refer to several statutes and other authorities, which, in their view, support their argument that they already have a "legal right-of-way" to use the road. Appellants point to section 8 of the Act of July 26, 1866, 43 U.S.C. | 932 (1970), otherwise known as R.S. | 2477 (repealed by section 706(a) of FLPMA, 90 Stat. 2793, effective Oct. 21, 1976, subject to existing rights-of-way). See section 701 of FLPMA, 43 U.S.C. | 1701 note (1982), which provides that "[t]he right-of-way for construction of highways over public lands, not reserved for public uses, is hereby granted."

In Nick Dire, 55 IBLA 151, 154 (1981), the Board noted that:

"[T]his Department has considered State courts to be the proper forum to decide ultimately whether a public highway under 43 U.S.C. | 932 (1970) has been created under State law and to adjudicate the respective rights of interested parties. Alfred E. Koenig, A-30139 (November 25, 1964); Herb Penrose, A-29507 (July 26, 1963)."

Quoting Homer D. Meeds, 26 IBLA 281, 298, 83 I.D. 315, 323 (1976), however, the Board stated as follows:

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

fn. 3 (continued)

"[W]hile the question of the existence of a 'public highway' is ultimately a matter for state courts, BLM is not precluded from deciding the issue where it is considering an application for a private access road right-of-way, under section 501 of FLPMA, supra. The potential conflict is properly a matter of administrative concern."

55 IBLA at 154. Other than appellants' passing reference to R.S. | 2477, there is no indication in the file that BLM has considered whether the West Weaverville Road qualifies as an R.S. | 2477 road. BLM may wish to consider this question, as a matter of administrative concern, if appellants decide to submit an application for a right-of-way. See also The Sierra Club, 104 IBLA 17 (1988); Dean R. Karlberg, 98 IBLA 237, 240 (1988).